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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

PACIFIC-ATLANTIC STEAMSHIP CO.

and

E. J. LAVINO & COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

The Petition

of

PACIFIC-ATLANTIC STEAMSHIP CO., as owner of the American Motorship *Oregon* for exemption from or limitation of liability.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners above named, by their respective counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled suits on June 9th, 1949.

Opinions Below.

The opinion of the United States Court of Appeals (R. 529) has not yet been officially reported, but is unofficially printed at 1949 A. M. C. 1120. The opinion of the District Court for the Eastern District of Virginia (R. 31) is reported at 81 F. Supp. 777.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The judgment of the Court of Appeals was entered on June 9th, 1949 (R. 544). Thereafter, and within the time permitted by the Court of Appeals, your petitioners herein presented to that Court a petition for rehearing, which was denied by order of the Court entered August 4th, 1949 (R. 558).

The Questions Presented.

This litigation arose out of a collision which occurred, in darkness, on the early morning of December 10th, 1941, between the American merchant vessel *Oregon* and the United States battleship *New Mexico* in the Atlantic, about 40 miles south of Nantucket Shoals Lightvessel, and which resulted in the total loss of the *Oregon,* the loss of life of 17 of her men, the loss of her valuable cargo, and substantial damage to the *New Mexico.* Your petitioner, Pacific-Atlantic Steamship Co., owned the *Oregon,* and your petitioner Lavino owned a valuable portion of her cargo.

When the *Oregon* and *New Mexico* first became aware of each other's presence, they were each proceeding at approximately the same speed of 14 knots, without show-

ing any lights, pursuant to instructions broadcast by radio by the Navy Department shortly after "Pearl Harbor." The *Oregon* turned on her navigating lights immediately upon sighting the unlighted loom of the battleship off her starboard bow. The *New Mexico* was being escorted and "screened" by three United States destroyers, the *Sims, Hughes* and *Russell;* and although the watch officers of the *Sims* and *New Mexico* had had the *Oregon* under observation, through powerful binoculars, for a substantial time before the *Oregon's* men saw the unlighted battleship, the *New Mexico* and her escorts did not turn on their navigating lights when they first sighted the unlighted *Oregon* nor for a substantial period after the *Oregon* had lighted hers.

The *Oregon's* master and wheelsman, who were the only surviving members of her deck watch, testified that when the *New Mexico's* lights came on she was seen to be approaching on a crossing course, at high speed, although neither her exact course nor her real speed could be determined instantly from her lights, and that she and the *Oregon* were then in such close quarters and in such immediate danger of collision that the Rule of Special Circumstances applied, calling for immediate avoiding action by both vessels; and the master of the *Oregon,* in the exercise of his best judgment, continued at full speed with hard left rudder, in an effort to swing away from or parallel the oncoming battleship (R. 88, 91-97, 107, 110-113).

Many of respondent's witnesses herein and certain records from the *New Mexico* and the destroyer *Hughes* confirmed that the *Oregon* and the battleship were in close quarters and in the jaws of collision when the *New Mexico* turned on her navigating lights (R. 192-193, 203, 208, 210, 229, 230, 233, 236, 241, 306, 312). But the navigating officers of the *New Mexico* contended that when the battleship

turned on her lights (following the *Oregon's*), the two vessels were not in close quarters and were still so far distant that the Starboard Hand Rule applied, making the *New Mexico* the "privileged" vessel and justifying them in holding course and speed until an estimated 60 seconds before collision, when the engines were reversed and the rudder put hard right, too late to avoid the disastrous collision.

The trial of the case was stayed, by order of the District Court, for the duration of the war, and no testimony herein was taken by respondent until the early part of 1946. But, in December 1941, a few days after the collision, a Naval Court of Inquiry investigating the collision in secrecy, obtained the evidence of a large number of witnesses from the *New Mexico* and her escorting destroyers. During the course of the case at bar in the District Court, respondent disclosed certain portions of the factual record of the Naval Court's investigation, but declined to disclose the balance thereof, which contained the evidence of a number of "key" witnesses, who were *not* offered as witnesses in this litigation: and there were developments before the Court of Appeals which strongly indicate that the undisclosed portion of the Naval record contains evidence which would throw much light upon the facts of the collision and would discredit the respondent's case.

Your petitioners presented motions to both the District Court and the Court of Appeals for an order directing respondent to discover and show to your petitioners the complete factual record of the investigation by the said Naval Court of Inquiry. The District Court denied the motion so made to it (R. 12-13; 491-492); and its rulings were affirmed, apparently on a basis of "privilege" without any mention or ruling by the Court of Appeals with

reference to the separate motion for Discovery pending before it (R. 535).

Having declined to order the respondent to make Discovery of all of the factual information in the record of its investigation by its Navy Department, the Trial Judge found that the *New Mexico* turned on her lights when she and the *Oregon* were 1500 to 2200 yards apart, that the normal Starboard Hand Rule applied, despite the failure of the *New Mexico* to turn on her navigating lights sooner, and that, therefore, the *New Mexico* was justified in holding her course and speed until too late to avert collision (R. 75-78). The *Oregon* was thereupon held solely liable, because of faulty lookout, failure to blow a "rudder" whistle when she went hard left, and failure to keep clear of the *New Mexico* in accordance with the normal requirements of the Starboard Hand Rule (R. 78). The Court of Appeals, affirming the findings and conclusions of the District Court, held that the Starboard Hand Rule applied when the *Oregon* sighted the unlighted vessel on her starboard bow and *before* the *New Mexico* turned on her lights.

Your petitioners now present to this Court the following questions:

FIRST: Did not the Court of Appeals err in failing to order a Discovery of the complete factual record of the Naval Court of Inquiry, and was not its decision in conflict with the principles of law stated by this Court in *Hickman* v. *Taylor,* 329 U. S. 495?

SECOND: Did not the Court of Appeals err in holding (*contra* to decisions in the Second Circuit), that the Starboard Hand Rule applied before the *New Mexico* turned

on her lights, and also in holding that that Rule applied when the *New Mexico* belatedly turned on her lights, in spite of her delay in showing them, thus making the *New Mexico* the "privileged" vessel, and justifying her in holding her course and speed; and was not the situation governed by the Rule of Special Circumstances, under which both vessels were required to take prompt avoiding action by alteration of course or speed?

Statutes and Rules Involved.

With respect to the question of Discovery:

Your petitioners' suit against the United States was brought under the Act of March 3rd, 1925, known as the Public Vessels Act. 46 U. S. C. 781 *et sequi.* Section 2 thereof (46 U. S. C. 782) provides, in part, as follows:

> "Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'an Act authorizing suits against the United States in admiralty, suits for salvage services, * * * and for other purposes' approved March 9, 1920, or any amendment thereof, insofar as the same are not inconsistent herewith, * * *"

The Act of March 9, 1920, known as the Suits in Admiralty Act, 46 U. S. C. 741 *et sequi,* provides in Section 3 thereof (46 U. S. C. 743), in part, as follows:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

Admiralty Rule 32 provides as follows:

"DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action, and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

With respect to the Rules of navigation:

The statutory International Rules of the Road, 33 U. S. C. 62 *et sequi*, contain the following provisions:

"(33 U. S. C. 72) Art. 2. A steam vessel when under way shall carry (a) On or in front of the foremast * * * a bright white light * * * so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles."

"(33 U. S. C. 72). (b) On the starboard side a green light so constructed as to show an unbroken

light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

"(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

"(33 U. S. C. 72). (e) A steam vessel when under way may carry an additional while light similar in construction to the light mentioned in subdivision (a). * * *."

"(33 U. S. C. 104). Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

"(33 U. S. C. 106). Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"(33 U. S. C. 107). Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"(33 U. S. C. 108). Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"GENERAL PRUDENTIAL RULE"

"(33 U. S. C. 112). Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."*

STATEMENT.

The distance between the vessels when the *New Mexico* belatedly turned on her navigating lights is a crucial question in determining the liabilities for this disastrous collision. By turning to the right when the unlighted *Oregon* was first seen, or even when the *Oregon* turned on her lights, the *New Mexico* would have turned *away from* the approaching vessel, and would have avoided the collision, no matter what the *Oregon* did; and unless the distance when the *New Mexico* turned on her lights was sufficient to bring the Starboard Hand Rule into effect, she had no right in law to hold her course and speed as she admittedly did, and she was guilty of contributory negligence under the Rule of Special Circumstances for not taking timely avoiding action. That negligence of the *New Mexico* is a question quite apart from any negligence on the part of the *Oregon* with respect to what she did.

Consequently it was of the utmost importance to the just determination of the liabilities herein that all of the

* The "General Prudential Rule", as its language indicates, relates to any situation necessitating a departure from the other rules, and it is commonly referred to as the Rule of Special Circumstances. Under that rule, each vessel involved must take the prompt and proper action necessary to avert disaster, and neither vessel has any "privilege" or right of way.

Articles 19 and 21-23 contain the provisions which, together, are commonly referred to as the Starboard Hand Rule.

available proofs with respect to this question of distance be produced. It was even more important, in that the loss of life resulting from the collision had deprived the *Oregon* of the evidence of her watch officer and lookout.

There is evidence in the record herein that the commanding officer and watch officer of the *Sims* and the commanding officer of the *Hughes* admitted in their official reports, or in their testimony to the Naval Court, shortly after the collision, that, although the unlighted *Oregon* had been sighted through binoculars at a distance of about 4000 yards, she was permitted to cross the *Sims* and get inside the "screen" without being "challenged" or otherwise warned of the approach of the Naval flotilla, and that the *Oregon* was *inside* the "screen" when she turned on her lights (R. 246-247, 308, 310, 321). Aside from the destroyers' breach of their duty to prevent a possible collision by keeping all vessels outside of the "screen", as admitted by Admiral Ainsworth (R. 282-284, 286), the significance of those admissions is that the "screen" was formed on the arc of a circle with a radius of 2000 yards from the battleship (R. 34), and, therefore, when the *Oregon* turned on her lights *inside* the "screen", the distance between her and the *New Mexico* must have been less than 2000 yards and must have been still much less when the *New Mexico* turned on her lights later.* Those admissions were not referred to by the Trial Judge or by the Court of Appeals.

There is also every reason to believe that certain "key" Navy witnesses examined by the Naval Court of Inquiry (who were not called in this litigation) such as the watch officer of the *Hughes*, the officer in charge of the

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* The *Oregon's* course of 340° true and the *New Mexico's* course of 216° true were converging at an angle of 124°, so that, at their respective speeds of approximately 14 knots, the distance between them was closing at a rate of about 824 yards per minute.

watch on the *New Mexico's* Flag Plot bridge, and the *New Mexico's* quartermaster and his assistant on her navigating bridge (R. 517-518) were interrogated and testified with respect to this important question of distance. Indeed, the respondent admitted before the Court of Appeals that the watch officer of the *Hughes,* who should have had reliable knowledge of the facts, told the Naval Court that the *Oregon's* lights came on when she was about 500 yards from the *New Mexico* (R. 518-519, 497-498). No such disclosure was made to the District Court.

Thus, there are most cogent reasons for a strong assumption that a disclosure of the complete Naval record, and the development of further proofs therefrom, would have thrown much light on this important question, and might have called for a finding that when the *New Mexico* turned on her lights to show her course and speed, the vessels were in close quarters, much less than 1500 yards apart, and not much more than about 60 seconds from collision, as the *Oregon* contended.*

Not long after the original libel and the answer thereto had been filed, a motion was presented to the District Court for discovery of the factual record of the Naval Court of Inquiry. It was denied by Judge Way in an order entered June 15, 1942, (R. 8-13) without any written statement of the reason for that denial. Remarks made by the Judge during the argument of the motion indicated his feeling that a Discovery should be denied lest, in the existing hostilities, it be injurious to the public interest. When respondent took its first depositions at San Francisco in 1946, your petitioners demanded production of the Naval record.

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* The variations in the Trial Judge's several references to this question of distance indicated difficulty in making his finding,—a difficulty which might have been eliminated by a Discovery of the complete record of the Naval Court. (R. 57, 60, 62, 75.)

Respondent's counsel first refused the demand but, after telephone conferences with the Department of Justice at Washington, stated that as each witness for respondent was called a copy of his testimony to the Naval Court of Inquiry, if any, would be produced. The Court of Appeals, in its opinion, commented that that arrangement was apparently satisfactory to your petitioners (R. 535). That comment is misleading. The arrangement *had* to be accepted at that stage of the proceedings because of Judge Way's earlier order; and the record shows, in the colloquy between counsel, that the acceptance of the arrangement was entirely without prejudice to the rights of the petitioners to renew their motion to the Court for a discovery of the complete record.

The motion was renewed to the District Court, during the trial before Judge Paul. Respondent did not then, or at any time in the District Court, disclose all of the witnesses who had been examined by the Naval Court of Inquiry but it was known that they included at least one or more "Key" witnesses whom respondent had not called to testify in the case at bar (R. 209, 277-278). Judge Paul, in his discussion of the motion, indicated that he denied it because he regarded it as an unjustifiable "fishing excursion" by your petitioners (R. 491-492).

As soon as possible after your petitioners had filed their appeal to the Court of Appeals, they presented to that Court a motion for an order requiring the respondent to produce and discover the complete factual record of the Naval Court of Inquiry and permitting your petitioners to reopen the record and offer to the Court of Appeals such new and material evidence as might be made available by the said Discovery (R. 480). After the argument of that motion in November 1948, the Court of Appeals ordered

that the motion be continued for determination on the final argument of your petitioners' appeal to that Court (R. 527). In its opinion, after final argument, the Court of Appeals affirmed the denial of the motions in the District Court apparently on the ground that the Naval record constituted a privileged document (R. 535). But the Court of Appeals, in its opinion, made no mention of and did not specifically rule on the separate motion which had been presented to it, and which was still pending, under its order of continuance, at the time of the final argument of the appeal.

The senior and junior watch officers of the *New Mexico* sighted the unlighted *Oregon*, through their binoculars, several minutes before the *Oregon's* limited personnel, without the aid of glasses, sighted the unlighted *New Mexico*. In violation of their standing orders, the battleship's watch officers did not immediately summon her captain to the bridge. They wasted precious minutes discussing between themselves and the Supervisory Head of the Watch the possibility that they were looking at another U. S. Naval vessel standing up to join their flotilla (R. 141, 154-157, 187, 196-197, 211-212). There is no indication that their battle stations were alerted, and their discussions with each other did not indicate that they feared the presence of an enemy vessel. Yet they did not turn on their navigating lights. The senior watch officer admitted that when he himself finally left his station on the bridge and went aft to waken the captain, no thought had been given to turning on the *New Mexico's* navigating lights. Even after the *Oregon* showed her lights, there was delay in switching on the battleship's until the *New Mexico's* quartermaster suggested the necessity of doing so (R. 174-175, 316).

The *New Mexico's* captain, awakened from his sleep, arrived on the navigating bridge about 30 seconds after

both ships were lighted (R. 40, 198, 533). His senior watch officer, who knew how the situation had developed, suggested an immediate alteration of course to the right to avoid the impending collision, but the captain delayed his avoiding action while looking at the *Oregon* through his binoculars. The captain testified that he thought that the Starboard Hand Rule applied, and therefore held his course and speed. He thought that he finally took his avoiding action about 1 minute before collision, but evidence from the battleship's engine room shows that the avoiding action was taken much less than 60 seconds before collision, and the ultimate event proved that the avoiding action was taken too late (R. 125, 137-138, 149, 158, 177, 180, 181).

Your petitioners believe that, in such circumstances, the *New Mexico*, having withheld her navigating lights after sighting the unlighted *Oregon*, could not be permitted, in law, to set up a Starboard Hand Rule situation, in her own favor, by belatedly switching on her lights, even at the distance found by the lower Courts, and that there is serious error, in law, in the holding by the Court of Appeals that the Starboard Hand Rule applied even *before* the *New Mexico* turned on her lights. The situation was governed by the Rule of Special Circumstances, and the captain and navigating officers of the *New Mexico* were negligent in not appraising the situation properly and in not taking prompt avoiding action, in time for it to be effective.

Reasons for Granting the Writ.

With respect to the Questions now presented herein, the decision of the Court below is in conflict with the decision of this Court in *Hickman* v. *Taylor*, 329 U. S. 495, and is in conflict with decisions in the Second Circuit.

Quite apart from their serious importance for the parties to this litigation, both of the Questions presented are of serious and far-reaching importance to the Merchant Marine of the United States. They have already arisen in other cases and will undoubtedly arise again in cases of a similar nature, and the decision of the Court below should be reviewed by this Court, in view of the confusion which that decision has now created.

As to the First Question Presented:

The failure of both of the lower courts herein to order a Discovery of the complete factual record of the investigation made by the Naval Court of Inquiry is in conflict with the principles of law laid down by this Court in *Hickman* v. *Taylor*, 329 U. S. 495, in which this Court said at p. 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

The case of *Bank Line Ltd.* v. *United States*, 163 F(2d) 133; 76 F. Supp. 801, involved circumstances and reasons closely similar to those involved in the present litigation, for ordering Discovery of those portions of the factual record of a Naval Court of Inquiry which had not already been disclosed. The District Court's order, directing a Discovery, was not officially reported but is printed in

1946 A. M. C. 660. The Court of Appeals, Second Circuit, 163 F(2d) 133, denying the Goverment's petition for a writ of prohibition or mandamus, set forth specific suggestions for the consideration of the District Court in the event of further proceedings for the enforcement of its order, and in the course of those suggestions stated that the undisclosed factual portions of the Naval record contained "testimony which would have to be furnished by the Government if it were a private litigant" (pp. 136-137), and indicated that denial of a Discovery thereof would be justified only if the Government showed sufficient grounds to establish that the Naval record should be regarded as a privileged document (pp. 138-139). Thereafter, the District Court, upon consideration of the suggestions of the Court of Appeals, concluded that the Government, having disclaimed considerations of military security as a reason for opposing the Discovery, was merely objecting to interference with the Navy's "housekeeping", and that the order for Discovery should be enforced (76 F. Supp. 801, 803). Your petitioners are informed that the *Bank Line* case was then settled, thus eliminating the Discovery.

In the case at bar, respondent showed nothing materially different from its showing in the *Bank Line* case to support its opposition to a Discovery of the complete factual portions of the Naval record (R. 514, 521-526). It is apparent from the record herein and the opinions in the *Bank Line* case that respondent's opposition is naively based on an argument that it would be embarrassed in its investigation of Naval disasters of this type, if it were compelled to disclose facts uncovered by its investigation tending to indicate liability of Naval vessels.

If the *New Mexico* had been a merchant vessel, owned and operated by the United States, the facts of the colli-

sion would have been investigated by the United States Local Inspectors (whose duties have now been taken over by the Coast Guard), and the complete factual record of such an investigation would have been made public. The investigation of the present collision by a Naval Court of Inquiry was of no different character and no good reason appears why the Navy should claim the right to make such an investigation in secrecy and withhold the facts so ascertained. Respondent has not suggested, and petitioners believe that it cannot suggest, that, after the termination of hostilities, a full disclosure of the Navy's investigation of the facts involved in this collision could in any way be prejudicial to the national security (R. 514).

By the statutory provisions of the Public Vessels Act under which your petitioners are suing respondent, the suit should be heard and determined "according to the principles of law and to the rules of practice obtaining in like cases between private parties"; and in the *Bank Line* case, *supra,* the Court of Appeals, Second Circuit, pointed out that the Discovery would be compelled if the suit were between private parties. A strong inference seems to be inescapable that respondent, having unexplainedly failed to produce herein certain important witnesses who were examined by the Naval Court of Inquiry, refused and opposed a Discovery of the undisclosed factual portions of the Naval record because they contain facts which, if disclosed, would be helpful to your petitioners and harmful to respondent's defense.

As to the Second Question Presented:

The Court of Appeals held that the Starboard Hand Rule applied when the *Oregon* saw on her starboard bow the unlighted *New Mexico,* and that the *Oregon* was under a

duty to keep out of the way *before* the *New Mexico's* lights came on (R. 541). That is in conflict with the Second Circuit cases of *Lind* v. *United States,* 156 F. (2d) 231, 233, and *United States* v. *The Australia Star,* 172 F. (2d) 472, 474.

In all situations in which any of the Rules of the Road place upon one vessel a "burden" to keep clear of a "privileged" vessel, it is self-evident that the "burdened" vessel must have accurate information in ample time to know what the course, speed and apparent intention of the "privileged" vessel may be, and, at night, such information can be furnished only by a display of the navigating lights prescribed by the Rules. In the *Lind* case, *supra,* the Second Circuit said: "Although the *Doubleday* was on the *Mary's* starboard hand, the case was one of 'special circumstances' for all navigation rules presuppose that both vessels shall be in sight of each other and can continually check each other's positions." In the *Alcoa Rambler,* 82 Lloyd's List L. R. 359, Lord Wright, speaking for the Privy Council, said, at page 367, that the "burdened" vessel "must be in a position to appreciate what the situation is and to know what the other ship is doing and whether it is on a course at all, or, if so, on what course." No such information or knowledge was available to the *Oregon* before the *New Mexico* showed her lights. In the darkness, the Master of the *Oregon* could not tell whether the unlighted vessel on his starboard bow was moving away or approaching, and could not determine her course and speed with respect to his course. The holding of the Court of Appeals is not only in conflict with the decisions of the Second Circuit but is contrary to the plain intent of the International Rules of the Road, and is of such far-reaching importance that the case should be reviewed by this Court.

For similar reasons, the Starboard Hand Rule did not apply when the *New Mexico* belatedly turned on her lights after withholding them for the substantial period that she had had the unlighted *Oregon* under observation. The present International Rules of the Road were adopted and enacted into our statutory law in 1890 (33 U. S. C. 62 *et sequi*). The International Conference which framed the Rules, despite the generally slower speed of steam vessels at that time, considered that, in clear weather, at night, the *minimum* information of a vessel's course and speed, to furnish adequate time for the avoidance of collision, should be furnished at a distance of 5 miles by the white masthead lights and 2 miles by the colored side lights. (33 U. S. C. 72(a) to (e), page 7 *supra*). All other provisions of the Rules involving "burdens" and "privileges" presupposed a display of the required lights, to furnish the necessary information of course and speed, at night, at the minimum distance stated.

Even though the "blackout" orders broadcast by the Navy Department licensed the vessels in the present case to proceed without showing the navigating lights required by statute up to the moment when each first became aware of the other's presence (as the parties herein stipulated in the District Court), it is undisputed that when each first saw the unlighted loom of the other they were far inside of the minimum distance at which navigating lights would normally furnish the information necessary for safe navigation. A belated display of lights could not furnish instantly the information necessary to bring the Starboard Hand Rule into effect, because accurate knowledge of course and speed could be obtained only by watching the lights for a further period of time, as indicated in *Lind* v. *United States* and the *Alcoa Rambler, supra.* The vessels were closing at 824 yards per

minute, and a belated display of the *New Mexico's* lights, even at 1500 to 2200 yards, did not meet the requirements of the Starboard Hand Rule. The situation was governed by the Rule of Special Circumstances.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

Pacific-Atlantic Steamship Co.

By Robert S. Erskine

Counsel.

E. J. Lavino & Company

By Leonard J. Matteson

Counsel.

Dated: New York, September 6th, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 314

PACIFIC-ATLANTIC STEAMSHIP CO.,

and

E. J. LAVINO & COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

THE PETITION

of

PACIFIC-ATLANTIC STEAMSHIP CO., as owner of the American Motorship *Oregon* for exemption from or limitation of liability.

REPLY BRIEF FOR PETITIONERS.

I.

When filing the petition herein, we had not seen the First Circuit decision in *United States* v. *Woodbury*, 175 F. (2d) 854. That decision, in principle, is in accord with the Second Circuit decisions cited in the petition (p. 18)

and therefore both those Circuits are in conflict with the ruling of the court below in the present case that an unlighted vessel, knowing that she is approaching another on crossing courses, in darkness, may claim the "privilege" or "right of way" of the Starboard Hand Rule even while continuing on without showing any lights.

The respondent's brief (pp. 11-12) argues that that ruling should be affirmed, but cites no authority in support of it. *The Folkestone,* 72 Lloyd's List L. R., 240, and the *Exanthia,* 77 Lloyd's List L. R. 207 (respondent's brief, p. 12), are not in point because neither case involved the Starboard Hand Rule. In each of those cases a vessel proceeding blacked out in a wartime convoy sighted another vessel approaching from the opposite direction on a parallel course which involved no danger of collision. In each case, the approaching vessel altered course, thereby creating danger of collision, whereupon the convoy vessel immediately turned on her lights and took avoiding action. The convoy vessel was held justified in at first withholding her lights and maintaining her course and speed, not because of any "right of way" under the Starboard Hand Rule (which did not apply) but merely because she was entitled to comply with her convoy instructions so long as the respective courses involved no risk of collision.

In the case at bar, the *New Mexico* knew from the outset that she and the *Oregon* were on crossing and "collision" courses, and it is with respect to such a situation that the court below has held that the Starboard Hand Rule applied while the *New Mexico* was showing no lights.

Your petitioners do *not* contend that the wartime blackout of lights at night abrogated the Rules of Navigation (Respondent's brief, p. 11). The Special Circumstance Rule (Article 27) is as much a part of those Rules as the

Starboard Hand Rule (Articles 19, 21, 22). The crux of the matter is that the *New Mexico* had no "privilege" to maintain her course and speed while withholding her lights, if the Starboard Hand Rule did not apply.

The ruling of the court below on this point is so drastic and unsupported an interpretation of the Starboard Hand Rule that it should receive this Court's consideration before it be written into the International Rules of Navigation, which apply to all vessels upon the high seas.

II.

It is asserted in respondent's brief (p. 13), as it was asserted in the court below, that there was no "good cause" for a Discovery of the factual record of the Naval Court of Inquiry because your petitioners might have sought to identify and interview the Navy's personnel. No great imagination is necessary to appreciate the probable limitations of any enlightenment your petitioners could have obtained by seeking to reach the Navy's witnesses, but, in any event, we believe that Admiralty Rule 32 was promulgated to eliminate just that sort of thing. And we submit that any such burden upon your petitioners would be wholly contrary to the principles laid down in *Hickman* v. *Taylor*, 329 U. S. 495.

The "good cause" for the Discovery lay in the fact that the collision had resulted in the deaths of the *Oregon's* watch officer and lookout and the loss of her logs and other records, thus seriously curtailing the evidence which would otherwise have been available to your petitioners. In that situation, and in view of the character of the defense asserted by the Naval vessels, common justice required that the respondent disclose all of the evidence in its possession.

Moreover, respondent's brief (p. 14) makes no attempt to sustain the conclusion of the court below that the factual record of the Naval Court of Inquiry was "privileged". The respondent merely asserts that the Navy Department should be upheld in its desire to treat the record of such Naval investigations as "confidential" in order to "promote a freedom in testimony which would not otherwise exist." Such statements, coupled with the fact that the respondent disclosed *some* of the said record in this case, certainly justify an irresistable inference that the Navy Department wishes to treat as "confidential" any evidence unfavorable to it which it may possess as a result of its investigation.

The Navy Department is, after all, a servant of the Public, and we earnestly dispute the Navy's right to jeopardize the ends of justice, in a case of this type, on the basis that, "in the interest of effective naval administration" it wishes "to keep confidential" any of the material evidence in its possession.

III.

Respondent's efforts to portray the petition herein as raising merely questions of fact emphasize the errors of the Court below with respect to the questions presented in the petition. For instance:

(a) Respondent's brief asserts that the *New Mexico,* after sighting the *Oregon,* continued on unlighted "for the purpose of security" (p. 5). But the story set out in the official logbook of the *New Mexico* (R. 309) and repeated in the pleadings on which respondent went to trial (R. 3, 5) asserted that the *New Mexico* turned on her lights promptly

—respondent's pleading alleged "immediately"—after sighting the *Oregon* and 8 minutes before collision. Although the time interval set forth in that story was discredited by the court below, the story contained no suggestion that the *New Mexico* withheld her lights for the purpose of security. The *New Mexico's* senior watch officer admitted that he gave no thought to turning on the lights (R. 174-175), and it appears that the *New Mexico's* Supervisory Head told the Naval Board of Inquiry that the turning on of lights was overlooked until the quartermaster (a petty officer) suggested it (R. 316).

When did it first occur to respondent to argue that the *New Mexico* withheld—(i.e. *intentionally*)—her lights for the purpose of security?

(b) Respondent's brief (p. 4) asserts that the destroyers "challenged the *Oregon* with blinker light signals, but received no response." That statement overlooks (as the court below overlooked) the admissions from the destroyers that, by reason of the (unexplained) lack of a signalman on the *Sims'* bridge, no challenge was made to the *Oregon* until after she was inside the "screen" and therefore no more than about 1,000 yards from collision (R. 308, 310, 321).

In so far as those may seem to be details of fact, the willingness of the court below to deal with them on such a record as the respondent presented accentuates the grave injustice in the refusal to order that the respondent make a discovery of all of the evidence in its possession in the complete transcript of record of the Naval Court of Inquiry.

IV.

We would not have burdened the Court with this additional brief, were it not for our sincere belief that the decision of the court below rests upon serious errors, as set forth in the petition herein, which not only have resulted in injustice to your petitioners, but also are of such great importance to the maritime world that they should receive this Court's consideration.

Respectfully submitted,

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Leonard J. Matteson,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 314

PACIFIC-ATLANTIC STEAMSHIP CO. AND E. J. LAVINO & COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 31) is reported at 81 F. Supp. 777. The opinion of the United States Court of Appeals (R. 529) is reported at 175 F. 2d 632.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1949 (R. 544). Petitioners' motion for rehearing was denied in an order entered on August 4, 1949 (R. 558). The petition

for a writ of certiorari was filed on September 7, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in sustaining the district court's findings that the merchant ship *Oregon* was at fault in failing to keep a proper lookout and in failing to observe the Starboard Hand Rule.

2. Whether the district court exceeded its discretion in refusing to require production of the record of testimony before the Naval Court of Inquiry.

STATUTES, RULES, AND REGULATIONS INVOLVED

The pertinent provisions of the statutes, rules, and regulations involved are set forth in the Appendix, *infra,* pp. 20-27.

STATEMENT

At 4:42 or 4:43 a. m. on December 10, 1941, three days after the Japanese attack at Pearl Harbor, the United States battleship *New Mexico* (escorted by three destroyers) and the merchant ship *Oregon* collided at a point in the Atlantic Ocean about forty miles south of Nantucket Shoals Lightship. Both vessels suffered damage as a result of the collision, and the *Oregon* sank between 1:00 and 2:00 p. m. the same day while endeavoring to proceed to Boston. Petitioner Pacific-Atlantic Steamship Company, owner of the *Oregon,* insti-

tuted a libel against the United States under the Public Vessels Act (43 Stat. 1112, 46 U. S. C. 782, *infra,* pp. 23-24) in the United States District Court for the Eastern District of Virginia, for the loss of that vessel, alleging that the collision and loss were caused by the negligence of the officers in charge of the *New Mexico.* Petitioner E. J. Lavino & Company, owner of a part of the cargo of the *Oregon,* intervened in the libel proceeding,[1] and the United States filed a cross-libel, alleging that the collision was caused by negligent navigation on the part of the *Oregon* (R. 31-34). The district court concluded that the collision was caused solely by faults and errors in navigation on the part of the *Oregon,* and, after granting Pacific-Atlantic's petition for a statutory limitation of its liability, decreed that the United States recover on its cross-libel from Pacific-Atlantic for the damage sustained by the *New Mexico* (R. 77-78, 83). The district court further decreed that petitioner E. J. Lavino & Company, owner of a part of the cargo of the *Oregon,* was entitled to no recovery on its intervening libel from either the United States or Pacific-Atlantic (R. 83-84). The court below approved the district court's determination that the collision was caused solely by the *Oregon's* negligence, and affirmed the decree of that court (R. 529-543).

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[1] The libel and intervening petition were subsequently amended to include charges of negligence on the part of the destroyers which were escorting the *New Mexico* (R. 82).

Prior to the collision in question, the *Oregon* was moving on a course of 340 degrees true (about north-northwest) and the *New Mexico* on a course of 216 degrees true (about southwest by south). The speed of both ships was approximately 14 knots. Both were running without lights pursuant to a Navy Department order made necessary by our recent entry into the war (R. 74). Escorting the *New Mexico,* proceeding on the same course and at the same speed, were three destroyers, the *Sims,* the *Hughes,* and the *Russell.* These, in the order named, were located in formation 20 degrees forward of the port beam, dead ahead, and 20 degrees forward of the starboard beam of the *New Mexico,* forming an arc of a circle 2,000 yards from the latter (R. 21, 29, 76).

The night of the collision was cloudy but a moon shone through the overcast; the district court found from the evidence that unlighted ships of the size involved here were visible to the naked eye at a distance of about 2 miles (4,000 yards) (R. 89, 106, 346, 373). When the 2 ships were some 5,000 yards apart, the *Oregon,* bearing about 45 degrees on the *New Mexico's* port bow, was sighted through binoculars by the latter's officer of the deck (R. 155, 75). The *Oregon* was sighted from the destroyer *Sims* at a distance of 4,000 yards, and from the destroyer *Hughes* at approximately the same distance (R. 254-255, 264-265, 308, 419, 428). These destroyers challenged the *Oregon* with blinker light signals, but received no response (R. 437, 438,

476). The *New Mexico,* continuing unlighted for the purpose of security, maintained her course and speed in accordance with the rule requiring a vessel on the starboard hand of another to do so (R. 125; see Article 21, *infra,* p. 22).

The *Oregon's* captain testified that he and his lookout first sighted the *New Mexico* at a distance of between 2,000 and 3,000 yards (R. 96-97, 340). Up to this point, nobody on the *Oregon* had seen any of the destroyers (R. 76). Immediately upon sighting the *New Mexico,* the *Oregon* turned on her lights; within 20 seconds later, the *New Mexico* was lighted (R. 75). The distance between the ships when both were lighted was variously estimated by different witnesses (*E.g.,* R. 91, 188, 265-266, 441). The district court, "on weighing all of the evidence", was convinced that it "was not less than 1500 yards and possibly as much as 2,500 or 3,000 yards" (R. 57). The court's findings of fact report the distance as 1500 to 2200 yards (R. 75).

The captain of the *Oregon* testified that the *New Mexico's* bearing appeared to remain the same after her lights came on as it had been when he first sighted her (R. 328). He and a seaman who had been at the wheel testified that, following the *New Mexico's* display of lights, he ordered his helm left and then hard left, maintaining his ship's full speed until the collision (R. 89, 108, 330). The commanding officer and other officers of the *New Mexico* stated that no change was observed in the *Oregon's* course until practically the point of colli-

sion (R. 125-126, 158, 189). The district court found that the *Oregon* made no change in her course and speed after sighting the *New Mexico* "until approximately a minute before the collision when she turned to her left across the course of the *New Mexico* in an attempt to avoid collision" (R. 75). The *Oregon* gave no signal at any time of her proposed maneuvers (R. 75).

When the ships had closed to a distance of about 700 yards and it appeared to the *New Mexico's* commanding officer that the *Oregon* could no longer avoid collision by her own action, the *New Mexico's* rudder was ordered full right and her engines full speed astern (R. 125). At this point, however, with the *Oregon* crossing her bow from port to starboard, the *New Mexico's* action did not succeed in preventing the collision. The ships met at an angle of between 20 and 45 degrees, the stem of the *New Mexico* striking the starboard side of the *Oregon* (R. 76).

After a more detailed review of the evidence than has been presented here, the district court held that the collision had been caused solely by the *Oregon's* faulty navigation (R. 77-78). Having found that weather conditions at the time of the collision were such as to afford visibility of an unlighted ship as large as the *New Mexico* at a distance of 2 miles, the court concluded that the circumstances of this case did not warrant departure from the International Rules for Navigation (R. 77). These Rules, which are embodied in the Act

of August 19, 1890, as amended, *infra,* pp. 20-23, impose upon all ships the duty of keeping a proper lookout. In addition, they direct a ship sighting another to starboard on a crossing course to keep out of the other's way, to avoid crossing in front of the other where possible (Articles 19 and 22, *infra,* pp. 21-22), and, if necessary, to "slacken her speed or stop or reverse", 26 Stat. 327 (Article 23). The Court held that the *Oregon* had negligently violated the rules in (1) failing to keep a proper lookout; (2) failing to take appropriate action when she first sighted the *New Mexico* on her starboard hand; (3) failing, after both ships were lighted, to avoid crossing the *New Mexico's* bow; and (4) giving no signal to warn of her change of course when she finally turned to the left immediately after the collision (R. 77-78). The court below, after another extensive review of the evidence, approved these conclusions (R. 531-542).

On December 15, 1941, in accordance with its administrative practice, the Navy convened a Court of Inquiry to investigate the circumstances of the collision. Notice of this action was given to the *Oregon's* owner and agent. An invitation to the *Oregon's* witnesses to appear and testify was tendered and declined. The Naval Court received in evidence excerpts from the logs and other documents of the naval vessels involved and the reports of the navigating officers. In addition, officers of the ships and some of the *New Mexico's* enlisted personnel testified orally. A stenographic record of the Court's proceedings was made (R. 512-513).

In April, 1942, petitioner Pacific-Atlantic Steamship Company moved for a pre-trial order of discovery of the naval vessels' logs, reports by navigation officers concerning the collision, and various other documents, including a copy "of any and all testimony" by personnel of the *New Mexico* before the Naval Court of Inquiry (R. 8-9). The motion was granted as to all the materials sought with the exception of the record of the Court of Inquiry (R. 12-13). Although discovery of this record was denied, petitioners were later supplied with true copies of testimony given before the Naval Court by the witnesses called by respondent to testify during the course of this action (R. 468-469, 516-517). In addition, petitioners were provided with all the documents of which discovery had been granted and with complete answers to their interrogatories (R. 4-7, 515).

The motion for discovery of the Court of Inquiry's record was renewed at the close of the evidence in the trial court, and again denied. In a discussion with counsel, the court indicated that the basis for its ruling was a conclusion that petitioners had failed to establish good cause for the granting of their motion (R. 491). On appeal to the court below, petitioners again moved for production of the naval record (R. 480-510). That court, while it apparently entered no formal order on the motion before it, held that the record in question was privileged from discovery and that

the trial court had therefore properly denied the motion (R. 535-536).

ARGUMENT

Both of the questions raised by the petition for certiorari are of the type peculiarly within the competence of the trial court. Whether the *Oregon* was properly held to be solely at fault depends primarily on the district court's findings of fact. Whether petitioners' repeated motions for production of the Naval Court's record reflected any real need for information was a question which that same court, exercising the discretion necessarily entrusted to it, was in the best possible position to resolve. It is submitted that these questions of fact, decided adversely to petitioners in two courts below, present no basis for further review here. *Just* v. *Chambers,* 312 U. S. 383, 385; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278.

1. Petitioners urge (Pet. 5-6, 9, 17-20) that the Starboard Hand Rule (Article 19, *infra,* pp. 21-22) should have been held inapplicable until the ships were lighted, that the *New Mexico's* lights were turned on too late for the *Oregon* to maneuver properly under the Rule, and that the *New Mexico* should therefore have taken avoiding action sooner than it did. Each of these contentions is refuted by the factual determinations of both lower courts.

To repeat briefly, the district court found that, with a proper lookout, the *Oregon* would have sighted the *New Mexico,* a much larger ship, sooner than she did (R. 51, 77-78). Cf. *The New York,* 175 U. S. 187, 204. Had the *Oregon* sighted the *New Mexico* when the court found she should have, and when the *New Mexico* as the privileged vessel was entitled to assume she had (cf. *The Delaware,* 161 U. S. 459, 468-469; Farwell, *The Rules of the Nautical Road,* p. 177 (2d ed. 1944)), there would have been ample time for proceeding in accordance with the Starboard Hand Rule. In any event, the court also found that there was still time for the action required by the Rules after both ships had been lighted (R. 78).[2] The *New Mexico* was required by Article 21 of the Rules to maintain her course and speed (*infra,* p. 22). Until it became apparent that a collision could not otherwise be avoided, a change in course and speed would have exposed her to a charge of negligence. See *The Albert Dumois,* 177 U. S. 240, 249; Farwell, *op. cit., supra,* p. 75; La Boyteaux, *The Rules of the Road at Sea,* p. 124 (1920). At the critical moment, when, without signalling, the *Oregon* attempted the questionable maneuver of turning to port instead of attempting to pass port to port, the *New Mexico*

[2] The evidence (R. 328, 348) showed that both ships' bearings remained constant with respect to each other. The Steering and Sailing portion of the Rules, *infra,* p. 21, incorporating a basic principle of navigation, warn of a constant bearing as a danger sign.

made what the courts below found were entirely reasonable efforts to avoid the collision.

The argument that the blackout was such a special circumstance as to render the Starboard Hand Rule (Article 19, *infra*, pp. 21-22) inapplicable, we submit, completely overlooks the character of the navigation rules. Those rules are more than statutory commands; they are fundamental principles of good seamanship, as much a part of the mariner's mental equipment as an American motorist's knowledge that vehicles approaching each other must pass to the right. See *The F. J. Wolfe* [1946], P. 91, 94-96; Knight, *Modern Seamanship*, p. 461 (11th ed., Hall, 1945). To suggest that the rules were abrogated by the blackout is an argument for the abandonment of basic precautions when they are most needed. The situation pictured would leave unlighted ships in the impossible predicament of never being able to predict each other's movements. No such result is required by the cases petitioners cite as conflicting with the decision below. *Lind* v. *United States*, 156 F. 2d 231 (C. A. 2); *United States* v. *The Australia Star*, 172 F. 2d 472 (C. A. 2). As Judge Learned Hand, author of the opinion in the *Lind* case, has stated in a later opinion, while the necessity of traveling without lights admittedly constituted a "special circumstance," "it does not follow that the rules were in all respects in suspense." *Publicover* v. *Alcoa S.S. Co.*, 168 F. 2d 672, 674 (C. A. 2). Read without regard to the

significant factual differences between them and the case at bar, the *Lind* and *Australia Star* decisions stand for the proposition that an unlighted ship cannot claim to be privileged as against a lighted ship which would ordinarily be burdened. Here, on the other hand, the courts below found that the *Oregon* could reasonably have been expected to observe the Starboard Hand Rule when both ships were unlighted, and that, in any case, the ships were both lighted in ample time for observance of the Rule. Cf. *The Folkestone,* 72 Lloyd's List Rep. 240, 244; *The Exanthia,* 77 Lloyd's List Rep. 207, 209-210. These findings, fully supported by the record, are not made appropriate subjects for this Court's review by the fact that other findings may have been warranted in the differing circumstances of other cases.

2. Admiralty Rule 32, *infra,* pp.25-26, which petitioners contend was violated by denial of their motions for discovery, provides that a party seeking discovery must show "good cause therefor" and that production may be required only of matter "not privileged." We submit that both of these provisions sustain the decision below.

a. It has never been supposed that the rules permitting discovery compel a court to order the production of documents automatically upon motion. On the contrary, the provision in Admiralty Rule 32 requiring that "good cause" be shown for such production necessarily invests district courts with

discretionary power to judge whether a movant has established his need for the materials sought. See *Hickman* v. *Taylor,* 329 U. S. 495, 512; *Newell* v. *Phillips Petroleum Co.,* 144 F. 2d 338, 340 (C. A. 10).[3] In exercising its judgment in the present case the district court far from creating the conflict petitioners assert with *Hickman* v. *Taylor, supra,* has quite clearly been moved by considerations stressed by this Court in that decision.

Here, as in *Hickman* v. *Taylor,* the motion for discovery sought records of oral testimony of witnesses available for questioning by the movants. See 329 U. S. at 508. Petitioners' contention that the identity of some of these witnesses was not disclosed to them (Pet. 12) hardly seems weighty in view of their failure to examine those who were known to them and at least one of whom respondent offered to procure (R. 516). There is, furthermore, no suggestion that respondent, who answered completely all interrogatories and supplied extensive additional information, would not have furnished the names of witnesses upon demand. Cf. *The Australia Star,* 1946 A.M.C. 542 (S.D.N.Y.) and *The Wright and the Papoose,* 2 F. Supp. 43 (E.D.N.Y.), in which discovery of the Navy record was denied, but movants were permitted to reach the identity of witnesses.

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[3] Admiralty Rule 32 is, with variations of no consequence here, identical with Rule 34 of the Federal Rules of Civil Procedure.

Assuming, for the moment, that the material sought here was, as in *Hickman* v. *Taylor,* not technically "privileged," it was nevertheless material which respondent wished, in the interests of effective naval administration, to keep confidential. The Navy has consistently taken the view that the value of its courts of inquiry depends considerably on the fact that their records are privileged against disclosure. See the communication to the court below by Acting Secretary of the Navy Kenney, R. 524. Such "courts" are constituted solely for the purpose of securing information as a basis for possible disciplinary action or for the correction of deficiencies in naval administration. *Naval Courts and Boards,* c. 10, § 720, quoted at R. 522. It is believed that the assurance of non-disclosure promotes a freedom in testimony which would not otherwise exist and which is essential if these investigatory procedures are to serve their purpose. This administrative judgment is entitled to be weighed against petitioner's suggestion (Pet. 16) that the policy in question is "naively" based on a fear of disclosures "tending to indicate liability of Naval vessels." Cf. *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624, 638-643.

In defense of this policy respondent opposed the motion for discovery. In support of the motion, petitioners made dark references to "key" witnesses (R. 468; Pet. 10-11, 12), but were unable to claim that these witnesses were unavailable to

them or to show in any other way that the development of their case would be prejudiced by nondisclosure of the naval court's record. Cf. *Hickman* v. *Taylor, supra,* at p. 509. Without relying at all on the privileged character of this record, the trial court concluded that petitioners had failed to show good cause for its production. This assessment of the competing interests, by the court which tried the facts and could weigh on the spot the suggestion that damaging information was being suppressed, was, we submit, an entirely proper exercise of that court's discretion, correctly affirmed below.

b. The court below, in holding that discovery had been properly denied, pointed out that "the United States cooperated rather handsomely in enabling libelants to present their side of this case" (R. 535). And while the district court's ruling would appear to be sufficiently justified by petitioners' failure to show good cause for discovery, the court below recognized the "privileged status" of the record in question as an additional ground for the decision (R. 535).

Under R.S. 161, *infra,* p. 25, the "head of each department is authorized to prescribe regulations, not inconsistent with law, for * * * the custody, use, and preservation of the records, papers, and property appertaining" to his department. The Secretary of the Navy has provided by regulation that his Department's records may not be pro-

duced in court without his authority (*Naval Courts and Boards,* Art. C-15, *infra,* pp. 26-27), and, for reasons of policy which have already been mentioned, has consistently refused to authorize disclosure of court-of-inquiry records (R. 523). Unless the Secretary's regulation is for some reason invalid, it has the force of law. *Boske* v. *Comingore,* 177 U. S. 459; *Caha* v. *United States,* 152 U. S. 211.

Petitioners contend, in effect (Pet. 17), that, because the Public Vessels Act provides that suits thereunder "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties,"[4] the Navy Department may not interpose its rule against disclosure to prevent discovery of the record involved here. Without discussing this inference in detail, it would seem sufficient to point out that Congress, in recent legislation dealing with such records, has made it clear that the authority of the Secretary of the Navy does not suffer the suggested restriction under the Public Vessels Act. Section 5 of the amendatory Act of July 3, 1944 (58 Stat. 725, 46 U.S.C. 795, *infra,* pp. 24-25) added to the Public Vessels Act a provision authorizing civil courts, in cases stayed because of the war, to receive in

[4] The quoted language, from Section 3 of the Suits in Admiralty Act (41 Stat. 526, as amended, 46 U.S.C. 743, *infra,* p. 24), is made applicable by Section 2 of the Public Vessels Act (43 Stat. 1112, 46 U.S.C. 782, *infra,* pp. 23-24) which incorporates the former Act's provisions "in so far as the same are not inconsistent herewith * * *."

evidence records of testimony given before naval courts of inquiry by witnesses who have since become unavailable. A proviso to this section declares:

> That the use of such testimony shall not in any litigation make admissible the remainder of the said record *or compel the production of the remainder of said record by the United States.* (Italics added).

This proviso "implicitly recognizes that such testimony would ordinarily lie beyond the scope of the discovery process provided by the rules of litigation." *Anglo-Saxon Petroleum Co.* v. *United States,* 78 F. Supp. 62, 64 (D. Mass.). If the records of courts of inquiry were available merely on motion for discovery, the quoted statutory language would have practically no meaning. It becomes intelligible only as a congressional precaution to insure that records immune from disclosure do not lose this immunity beyond the limited extent prescribed.

With the exception of two rulings in a single case (*Bank Line* v. *United States,* 1946 A.M.C. 660, 977; 76 F. Supp. 801 (S.D.N.Y.)), the district courts have uniformly denied discovery of records of testimony before courts of inquiry. *The Wright and the Papoose,* 2 F. Supp. 43 (E.D.N.Y.); *The Australia Star,* 1946 A.M.C. 542 (S.D.N.Y.); *Maryland ex rel. Kent* v. *United States,* 1947 A.M.C. 1336 (D. Md.); *Anglo-Saxon Petroleum*

Co. v. *United States,* 78 F. Supp. 62 (D. Mass.). Petitioners' reference (Pet. 14) to a "conflict with decisions in the Second Circuit" is presumably based on the two divergent rulings cited above. The case in which those rulings were made is, in any event, distinguishable from the case at bar in that the district court there was convinced, as the courts below were not, that a "proper showing" had been made for discovery.[5] But the point of present importance is that petitioners can claim no conflict, in terms of this Court's Rules, between circuits.[6] The Court of Appeals' decision in *Bank Line* v. *United States,* 163 F. 2d 133 (C.A. 2), upon which petitioners appear to place some reliance (Pet. 15-17), held only that writs of prohibition and mandamus were improper methods of attacking an order granting discovery, and expressly stated that there was no need then to pass on the question raised here. See 163 F. 2d at 139.

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[5] See 1946 A.M.C. at 978: "Each case rests on its own facts and is dependent upon a proper showing by the moving party before relief can be granted."

[6] It is of some significance, in this connection, that two of the decisions cited above in which discovery was denied are from the same circuit, one from the same district, in which the "conflict" asserted by petitioners arises.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. Act of August 19, 1890, as amended, 26 Stat. 320; 28 Stat. 82; 33 U.S.C. 61 et seq., embodying International Rules for Navigation at Sea:

RULES CONCERNING LIGHTS, AND SO FORTH

* * * * *

ART. 2. A steam-vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an

arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance. (33 U.S.C. 72.)

Steering and Sailing Rules

Preliminary—Risk of Collision

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (33 U.S C. 101.)

* * * * *

Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel

which has the other on her starboard side shall keep out of the way of the other. (33 U.S.C. 104.)

Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

NOTE.—When in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (33 U. S. C. 106.)

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (33 U. S. C. 107.)

Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (33 U. S. C. 112.)

* * * * *

NO VESSEL, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be re-

quired by the ordinary practice of seamen, or by the special circumstances of the case. (33 U. S. C. 121.)

2. Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781-782):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

Sec. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An

Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

3. Suits in Admiralty Act, as amended (41 Stat. 526; 49 Stat. 1987; 46 U. S. C. 743):

Sec. 3. * * * Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *

4. Act of July 3, 1944, 58 Stat. 723, 725; 46 U. S. C. 795:

Sec. 5. In any case in which either the United States or a claimant against the United States in one of the cases specified in section 1 of this Act [cases stayed because of the war] has been prevented by any stay or suspension provided for in this Act from examining any witness, and in any case where the United States shall establish to the satisfaction of the court that it has refrained from instituting suit or from taking the testimony of any witness in any pending suit in order to avoid endangering the security of naval operations or interfering with such operations and where, in either of

such cases, it shall appear to the satisfaction of the court, on appropriate evidence or by agreement by counsel, that the United States or the claimant, as the case may be, is unable after reasonable efforts to secure the testimony of any such witness, the court shall receive in evidence, in lieu of such testimony, * * * (b) the statement or testimony of such witness before a naval investigation, board of investigation, court of inquiry, or court martial, or Coast Guard investigation: *Provided,* That the use of such testimony shall not in any litigation make admissible the remainder of the said record or compel the production of the remainder of said record by the United States. * * *

5. R.S. 161, 5 U.S.C. 22:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

6. Admiralty Rule 32:

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts,

letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

7. Naval Courts and Boards, Art. C-15, 34 CFR 12.15:

Unless authorized by the Secretary of the Navy, persons in the naval service and civil employees are prohibited from producing official records or copies thereof in a civil court in answer to subpenas duces tecum, or otherwise, and from disclosing the information described in article 113, Navy Regulations, or the secret and confidential correspondence and information described in article 2005, Navy regulations. In all cases where copies of records are desired by or on behalf of parties to a suit, whether in a Federal or State court, such parties will be informed that it has been the invariable practice of the Navy Department to decline to furnish in the case of legal controversies, at the request of the parties litigant, copies of papers or other information to be used in the course of the proceedings, or to

grant permission to such parties or their attorneys to make preliminary or informal examination of the records, but that the department will promptly furnish copies of papers or records in such cases upon call of the court before which the litigation is pending. In all cases where the production of records in civil courts is authorized, the original records are not to leave the custody of the person producing them. However, copies of such records may be introduced into evidence.

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